7.31 COMPARATIVE NEGLIGENCE: ULTIMATE OUTCOME
(Approved 3/2000; Revised 2/2013)

If you find that the plaintiff and one or both of the defendants were negligent and proximately caused the injury, then you must compare the negligent conduct or fault of those parties in terms of percentages. You will attribute to each of them that percentage that you find describes or measures his/her negligent contribution to the happening of the accident. The percentages must add up to 100%. You should not allocate any percentage to any party who you have found was not both negligent or at fault and a proximate cause of the accident.

I will explain to you the effect of these percentages. In order for the plaintiff to recover against any defendant, plaintiff's percentage negligent conduct or fault must be 50% or less. If the plaintiff's percentage is more than 50%, he/she will not recover damages at all and your deliberations are concluded and you should not make any determination as to damages. A plaintiff whose percentage is 50% or less will recover from any defendant whose negligent conduct or fault you have found was a proximate cause of the accident. [1], [2], [3], [4], [5], [6], [7], [8], [9], [10]

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[1] The ultimate outcome charge is required where the jury apportions fault between plaintiff and one or more defendants. It is not to be used to tell a jury the effect of its apportioning fault between or among joint tortfeasors. *Brodsky v. Grinnel1 Haulers,* Inc.,181 *N .J.* 102, 122 (2004). (Held reversible error as " irrelevant" to jury's function of apportioning fault percentages and "highly prejudicial" to defendants).

[2] If one of the parties' liability is based on strict liability or statutory liability, such as for a dangerous condition of public property, *N.J.S.A.* 59:4-2, you should substitute a suitable phrase like "produced an unfit product" or "palpably unreasonable conduct" for negligent. Suitable change should be made elsewhere in the charge, where the word "negligent" or negligence"

appears. *See Williams v. Phillipsburg*, 171 *N.J. Super.* 278 (App. Div. 1979). There also are instances in which the term "accident" is inappropriate. "Incident" or "event" may be suitable substitutions. Where the plaintiff's negligence did not cause the accident but may have contributed to his/her injuries, as in the case of an auto passenger, then his/her negligence is best discussed as one of the causes of his/her injuries rather than as a cause of the accident.

[3] As to the appropriateness of apportioning fault among settling and non-settling defendants, *See Young v. Latta*, 123 *N.J.* 584 (1991).

[4] As to the appropriateness of trier of fact allocating percentage of fault to Defendant dismissed from medical malpractice case for failure to timely serve Affidavit of Merit, *See Burt v. W. Jersey Health Systems*, 339 *N.J. Super* 296 (App. Div. 2001).

[5] As to the inappropriateness of trier of fact conside1ing negligence of employer immune from suit because of Workers' Compensation Act, *See Ramos v. Browning Ferris Industries of Southern Jersey, Inc*., I 03 *N.J.* 177 (l 986).

[6] As to the appropriateness of trier of fact to determine comparative negligence of party dismissed following discharge in bankruptcy. *See Brodsky, Id* at 116.

[7] For cases where comparative negligence and intentioned conduct are at issue and should be apportioned by a jury, *See Steele v. Kerrigan*, 148 *N.J.* l (1997); *See also Blazic v. Aldrich*, l24 *N.J.* 90 (1991).

[8] For inappropriateness of comparative negligence in product liability context. *See Johansen v. Makita U.S.A., Inc*., 128 *N.J.* 86 (1992). *See also Cavanaugh v. Skil Corp* ., 331 *N.J. Super* 134, 189 (App. Div. 1999), *aff'd* 164 *N.J.* l , 4 (2000) (*Suter* rule applies in all workplace contexts, including construction sites). As to applicability of *Suter supra* to negligence in a factory setting, *see Green v. Sterling Extender Corp*., 95 *N.J.* 263,(1984) and *Ramos v. Silent Hoist and Crane Co*., 256 *N.J. Super* 467 (App. Div. 1992).

[9] For appropriateness of comparative negligence appot1ioning in cases involving public entities, *See Frugis v. Bracigliano*, 177 *N.J.* 250 (2003). (Special charge for duty of school boards to ensure students safety from foreseeable harm of negligent and intentional conduct).

[10] As to the appropriateness of jury or judge to apportion fault in an environmental action and the effect of apportionment, *See N.J.S.A.* 2A:15-5 d (1) (2) (3).